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IN THE

Supreme Court of the United States

No. 71-

JOSE T. ACFALLE, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No. 71-

JOSE T. ACFALLE, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Jose T. Acfalle and 120 others, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 18, 1971.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 438 F.2d 913 (1971) and is reprinted in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1971, and is reprinted in Appendix B to this Petition. A timely petition for rehearing was filed on March 8, 1971, and was denied by the Court of Appeals on March 25, 1971. A copy of the order denying rehearing is reprinted in Appendix C to this Petition. A timely application for an extension of time to and including August 7, 1971, within which to file this Petition was made on June 11, 1971, and granted by Mr. Justice Douglas on June 15, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, construed in light of *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394 (1966), the jurisdictional provisions of the Tucker Act relating to a claim founded upon "any regulation of an executive department" permit civilian employees of the Navy to bring an action for back wages founded upon Navy regulations providing for additional wage "rate" differentials, without their having to resort initially to the administrative appeal remedy under Navy regulations relating solely to questions of job "rating."

2. Whether the Navy civilian employment regulations providing for payment of full time additional wage rate differentials are to be interpreted as mandatory or discretionary.

STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS INVOLVED

The provisions of the Tucker Act, 28 U.S.C. § 1346(a)(2), are set forth in pertinent part as follows:

> "§ 1346. United States as defendant
>
> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> "(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of

> Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

The provisions of the following Navy civilian employment regulations are set forth in pertinent part in Appendix D to this Petition:

1. The Definition of Civilian Ungraded Rating of Laborer, NAVEXOS P-1005-233, as revised, December 1961.

2. The Definition of Civilian Ungraded Rating of Stevedore, NAVEXOS P-1005-089, as revised, June 1962.

3. The Definition of Civilian Ungraded Rating of Stevedore, NAVEXOS P-1005-089, as revised, November 1966.

4. NCPI (Navy Civilian Personnel Instructions) 531, Wage Fixing and Ungraded Rating Determination, NAVEXOS P-122-531-290, as revised, April 22, 1966.

5. NCPI (Navy Civilian Personnel Instructions) 610, Hours of Work, NAVEXOS P-122-610-270, as revised, July 22, 1965.

STATEMENT OF THE CASE

Petitioners, Jose T. Acfalle and 120 others,[1] brought suit under the Tucker Act, 28 U.S.C. §1346(a)(2), for back wages from July 1962 to July 1968 allegedly owed to them as former and present civilian employees of the United States Naval Supply Depot at Guam. The district court's jurisdiction was also invoked under the Organic Act of Guam, 48 U.S.C. §1424(a). Petitioners' claims were based on certain

[1] The names of all petitioners with their dates of job appointment and termination, when applicable, were set forth in the government's Exhibit A(1) in the district court (R. 42-44), reprinted in Appendix E to this Petition. Although the government claimed that no record of employment existed for two of the 121 plaintiffs—Jose A. Aguon and Francisco L. Guerrero (R. 32), petitioners took issue with this contention (*see* R. 22). "R" refers to the Transcript of Record in the Court below.

Navy civilian ungraded rating definitions and civilian employment regulations (*see* App. D.).

1. *The Basis for Petitioners' Claims.*

In June 1962, all employees of the Guam Naval Supply Depot, who were then holding the "Civilian Ungraded Rating of Stevedore" were demoted to the lower "Civilian Ungraded Rating of Laborer."[2] The demotion was allegedly "due to a reduction in the volume of stevedore work" at the Naval Depot (Sandberg Affidavit ¶ 4, at R. 41). All of the petitioners "who were employees of the Naval Supply Depot and were holding the rating of stevedore at that time" were demoted in the June 1962 action (*id.*). Although petitioners could have appealed the "change to lower grade" within the Department of the Navy under NCPI (Navy Civilian Personnel Instructions) 531.3-8 (App. D, at 11a-12a), none did so (Sandberg Affidavit ¶ 7, at R. 41).

From July 1962 until June 1968, all petitioners while employed at the Naval Supply Depot continued to hold the Civilian Ungraded Rating of Laborer.[3] While holding such rating, however, they were able to receive "additional pay"[4] when they performed stevedoring-type work. "[T]hey received stevedore pay when actually performing stevedoring-type work and laborer pay while performing laborer-type work" (Sandberg Affidavit ¶ 5, at R. 41).[5] Petitioners'

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[2] As defined in NAVEXOS P-1005-233 (App. D., at 5a-6a).

[3] In 1968, new permanent stevedore positions were created, and petitioners were given the opportunity of applying for promotion to this rating (*see* Sandberg Affidavit ¶ 6, *at* R. 41).

[4] *See* NCPI 531.5 & Encl. 2, Part 3.2 (App. D, at 12a-16a).

[5] The political and economic realities of petitioners' pay situation were described in the Guam Daily News, Nov. 21, 1967, p. 9, col. 1: "[W]hen they move a BOX on board ship they get paid at shipwork rate; but yet when they move the same BOX from the wharf or pier (off-board work) they then get paid only at laborer rate.... [T]he system is the result of some very bright and industrious supervisor(s) who felt that the NAVY can save some money by paying these people

additional pay was measured by the pay schedules applicable to the "Civilian Ungraded Rating of Stevedore," as defined in both the June 1962 and November 1966 revisions of NAVEXOS P-1005-089 (App. D, at 6a-9a). That definition provides in pertinent part: "This rating is commonly used on a *when-actually-engaged basis* for employees regularly rated as Laborer . . . or other rating, during the time that they are employed in loading or unloading ships, barges, and lighters . . ." (*id.* at 7a, 9a, emphasis added).

NAVEXOS P-1005-089 further provides that for the Stevedore Rating to be used as a measure for an additional pay differential "on a *full time basis* the employee must be performing the work described for more than fifty percent of his time" (*id.*, emphasis added). On the basis of this latter provision, petitioners claimed in their complaint (R. 8) that, during their period of employment at the Naval Supply Depot, each of them had performed the work of a stevedore for more than fifty percent of his working time, and that therefore each should have received additional pay "on a full time basis" *as measured by* the pay schedules applicable to the Stevedore Rating.[6] Because the Navy had not paid such full time stevedore wages to petitioners, petitioners demanded judgment against the government for the difference between the pay they had actually received and the additional pay they should have received as measured by the Stevedore Rating (R. 9).

2. *Proceedings in the District Court.*

In the district court, the government filed a motion for summary judgment (R. 30-38). Attached to the motion was an affidavit in which the Industrial Relations Director of the Consolidated Relations Office at the U.S. Naval

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STEVEDORE wages only when working on-board ship and laborer wages when off-board (this appears to have met the aggressive aims of the NAVY'S cost reduction program). . . ."

[6] *See* NCPI 531-Encl. 2, Part 3.2 (App. D, at 16a).

Station at Guam stated with respect to the Stevedore Rating (¶ 3, at R. 40):

> "It has always been our interpretation of this regulation that it permits but does not require the use of the stevedore rating in situations where an employee is performing stevedoring work for more than 50% of his working time."

The district court granted the government's motion for summary judgment "for the reason that the Court cannot, as a matter of law, require payment of the rate of pay of employees demanded by the Plaintiffs . . ." (R. 68).

3. *Proceedings in the Court of Appeals.*

The United States Court of Appeals for the Ninth Circuit affirmed the summary judgment, holding that petitioners' claims were barred under the Tucker Act because petitioners had "neither sought nor exhausted their administrative appeal" under NCPI 531.3-8[7] (App. A, at 2a).

Petitioners had contended before the court that they were "not contesting an improper rating," and were therefore not required to resort to the administrative appeal remedy provided by NCPI 531.3-8; instead, they asserted, they were merely "seeking the proper pay for the 'laborer' rating to which they [did] not object", and for which, therefore, they could assert a claim under the Tucker Act, without having to resort to the administrative remedy (*see* App. A, at 2a).

The Court rejected petitioners' contention: "[T]hey claim increased pay only because, they contend, NAVEXOS P-1005-089 requires that they be rated as stevedores if they perform that work more than 50% of the time. So the increased pay depends upon a change of rating" (*id.*). The

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[7] NCPI 531.3-8a (App. D, at 11a) provides: "The appeal procedure set forth here applies to any ungraded position where the sole issue is what the rating of a position should be. An appeal under the procedure can be properly made on only one basis: a belief that the rating of a position is incorrect."

court thus held that, since petitioners' claim involved "the rating of a position or the pay level of a rating" petitioners should have lodged an administrative appeal with the Navy (*id.*). Having failed to do so, they were barred from bringing their suit under the Tucker Act.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S DECISION CONFLICTS WITH PRINCIPLES OF TUCKER ACT JURISDICTION ESTABLISHED BY THIS COURT, AS WELL AS WITH LONG-STANDING ADMINISTRATIVE REGULATIONS OF THE NAVY

A. Principles of Tucker Act Jurisdiction

The Ninth Circuit's holding that petitioners were barred from bringing suit under the Tucker Act, 28 U.S.C. § 1346(a)(2), for failure to resort initially to the administrative appeal remedy (App. A, at 2a) is in fundamental conflict with the criteria for the invocation of jurisdiction under the Tucker Act formulated by this Court in *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394 (1966).

In *Utah Construction*, a government contractor had brought an action in the Court of Claims against the United States under the Tucker Act for breach of contract. The contract contained a so-called "disputes clause" that required the resort to an administrative appeal remedy for "'all disputes concerning questions of fact arising under this contract'" (384 U.S. at 397). The questions presented related to the conditions under which the administrative appeal procedures had to be invoked and whether there were any conditions under which an action *de novo* could be brought pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2). Certiorari was granted "because of the importance of these questions in the administration of government contracts" (384 U.S. at 400).

The Court held "that to the extent complete relief is available under a specific contract adjustment provision, . . . the controversy falls within the disputes clause," and the contractor must therefore "exhaust his administrative reme-

dies." (*id.* at 402).[8] To the extent, however, that "only partial relief is available under the contract," or, with respect to an alleged breach, no relief at all, then, the Court held, "the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract" (*id.*). Citing numerous Court of Claims cases (*id.* at 405-06) as the basis for rejecting the government's claim that all contract disputes had to be submitted initially to administrative action (*id.* at 403-04), the Court emphasized that a "contractor need not process pure breach of contract claims through the disputes machinery before filing his court action" under the Tucker Act (*id.* at 405). *See id.* at 404 n. 6; *Crown Coat Front Co. v. United States*, 395 F.2d 160, 161 (2d Cir.), *cert. denied*, 393 U.S. 853 (1968).

The applicability of the ruling in *Utah Construction* to the present case is evident. Petitioners' suit for back wages under the Tucker Act, 28 U.S.C. § 1346(a)(2), may be characterized as a suit for breach of contract. NCPI 531.3-8a (App. D, at 11a) is the equivalent of the "disputes clause" in *Utah Construction*. It requires resort to the administrative appeal remedy only when "the sole issue is what the *rating* of a position should be" and when there is "only one basis" for the appeal, namely, "a belief that the *rating* of a position is *incorrect*" (emphasis added). By ignoring the difference between a "rate" and a "rating,"[9] the Ninth Circuit mistakenly held that resort to the administrative remedy was required. The fact is, however, that the gravamen of the complaint was not that petitioners believed that their rating of Laborer[10] was *incorrect* and

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[8] If the contractor is dissatisfied with the final administrative decision, he may then bring suit under the Tucker Act (384 U.S. at 399).

[9] *Compare* NCPI 531.1-2f(1) (definition of "rate") *with* NCPI 531.1-2g (definition of "rating") (App. D, at 10a-11a). In the definition of "rate," the regulation specifically states that " '[r]ate' is sometimes used to mean the same as 'rating' but this usage is not encouraged."

[10] As defined by NAVEXOS P-1005-223 (App. D., at 5a-6a).

should have been changed to Stevedore,[11] but rather that they should have received *additional pay* on a "full time basis" *as measured by* the higher skill rating of Stevedore because they had performed stevedoring-type work "for more than fifty percent" of their time.[12] "[T]he sole issue" raised by the complaint was not "what the rating of a position should be," but rather what "rate" of additional pay should petitioners have received. Given this issue, no relief could have been afforded under NCPI 531.3-8a (App. D, at 11a), and petitioners should not have been obliged to process their breach of contract claims for back wages through the administrative machinery established by the Navy regulations. Just as the contractor in *Utah Construction*, petitioners here had a right to bring suit initially under the Tucker Act. Review, therefore, is necessary to resolve the conflict between the Ninth Circuit's decision and the principles of Tucker Act jurisdiction established by this Court in the *Utah Construction* case.

B. The Navy Regulations

Petitioners' position is reinforced by the Navy civilian employment regulations on "Additional Pay,"[13] with which the Ninth Circuit's decision is also in basic conflict.

According to NCPI 610.5-1 (App. D, at 18a):

> "Additional pay means extra compensation over and above that authorized by statute or administratively established for the employee's classification or rating. It is a means of compensating the employee for environmental conditions not encountered by all employees in his classification or rating, or for the *performance of work of a skill level not required of all employees in his rating*" (emphasis added).[14]

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[11] As defined by NAVEXOS P-1005-089 (App. D., at 6a-9a).

[12] *See id.* at 7a, 9a.

[13] NCPI 531.5 & 531-Encl. 2, Part 3.2 (App. D, at 12a-16a); NCPI 610.5 (App. D, at 18a).

[14] *Accord*, NCPI 531.5-1 & .5-3a (App. D, at 12a, 13a).

As stated in NCPI 531.5-3b(2) (App. D, at 13a): "[A]n ungraded employee assigned to perform duties of a specified higher-paid rating will be paid at the *rate* of pay of the higher-paid *rating*" (emphasis added). NCPI 531.5-3b (2)(a) (App. D, at 14a) makes crystal clear that, in order for an employee to receive additional pay for the *temporary performance of duties in a higher rating*, he is not required to be changed or promoted to that higher rating:

> "The 'additional pay' duties must be beyond the scope of the employee's regular rating and clearly within the scope, and representative of the full skill level, of the specified higher rating (such that, *if these duties were to be performed on a continuing basis*, a conversion of the employees concerned to the higher-paid rating would normally be required) . . ." (emphasis added).

Finally, the regulations[15] make reference to "Additional Pay Schedules" in NCPI 531-Encl. 2 (App. D, at 16a), which, in Part 3.2 relating to "Extra Skill Work Involving Duties *Within* the Scope of Certain Established Ratings," provide that any employee with an ungraded rating, including a Laborer, who does the "kind of work" of a "Stevedore, as defined in NAVEXOS P-1005-089," is not to be promoted to the "rating" of Stevedore, but rather is to receive an "additional pay differential" as measured by the Stevedore Rating.[16] The Explanatory Note in the Definition of Civilian Ungraded Rating of Stevedore[17] embodies the policies of the "Additional Pay" regulations of NCPI 531 and 610:

> "This rating is commonly used on a *when-actually-engaged basis* for employees regularly rated as

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[15] NCPI 531.5-6b, .5-7 & .5-8 (App. D, at 14a-15a).

[16] *See also* NCPI 352.3-2b(3), .4-2b(7) & .4-5a(2), which refer to the provisions of NCPI 531.5 & Encl. 2 as "additional pay assignments." NCPI 352 (NAVEXOS P-122-352-271) relates to Separations (Non-Disciplinary), Furloughs, and Demotions.

[17] NAVEXOS P-1005-089 (App. D, at 7a, 9a).

> Laborer, . . . or other rating, during the time that they are employed in loading or unloading ships, barges, and lighters, ... To be used on a *full time basis* the employee must be performing the work described for more than fifty percent of his time" (emphasis added).[18]

Thus, review of the Ninth Circuit's decision is also essential to resolve the conflict between the court's decision on petitioners' claims for "additional pay" and the Navy civilian employment regulations relating to "Additional Pay."

C. The Serious Economic Impact of the Appellate Court's Decision on Laborers Employed by the Navy.

Review is further necessary because of the deleterious economic consequences the Ninth Circuit's decision will have on the many ungraded civilian employees of the Navy throughout the world, as well as on the 121 petitioners now before this court. This is so because the Definition of Civilian Ungraded Rating of Stevedore, which has been brought here into question, still serves as a measure of additional pay for laborers and other lower civilian ungraded ratings.

Ironically, the Ninth Circuit, in rendering its decision, had the mistaken view that the "full time basis" provision in the Stevedore Rating Definition had been "deleted in a revision of November, 1966" (App. A, at 2a n. 1). A mere glance at the texts of both the 1962 and 1966 revisions,[19] however, shows quite clearly that the "full time basis" pro-

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[18] Because of these explicit provisions of NAVEXOS P-1005-089 and NCPI 531 and 610, the line of authority established in United States v. McLean, 95 U.S. 750 (1878), and followed by the Court of Claims, *e.g.*, Coleman v. United States, 100 Ct. Cl. 41 (1943), that a federal government employee is entitled only to the salary of the position to which he is appointed regardless of the duties he actually performs is completely inapposite and irrelevant to the issues presented here.

[19] *Compare* NAVEXOS P-1005-089 (App. D, at 7a) *with* NAVEXOS P-1005-089 (App. D., at 9a).

vision was preserved intact in the 1966 revision, though placed into a separate paragraph.[20] This 1966 revision of the stevedore rating has continued in effect without change to the present day.

II. THE GOVERNMENT'S POSITION THAT THE RELEVANT PROVISIONS OF THE NAVY CIVILIAN EMPLOYMENT REGULATIONS ARE DISCRETIONARY, RATHER THAN MANDATORY, CONFLICTS WITH PRINCIPLES OF INTERPRETATION OF THE NAVY REGULATIONS PROPOUNDED BY THE COURT OF CLAIMS

In the affidavit attached to the government's motion for summary judgment, the Industrial Relations Director of the Consolidated Relations Office at the U.S. Naval Station in Guam stated with respect to the Definition of the Civilian Ungraded Rating of Stevedore[21] (¶ 3, at R. 40):

> "It has always been our interpretation of this regulation that it permits but does not require the use of the stevedore rating in situations where an employee is performing stevedoring work for more than 50% of his working time."

The government argued below that its administrative interpretation was consistent and reasonable and was therefore "entitled to great weight and must be sustained" (Brief, p. 5). The district court agreed (R. 68).

The Navy's interpretation of the Stevedore Rating Definition as being discretionary is in direct conflict with Navy civilian employment regulations,[22] which, under the princi-

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[20]The reason for the court's mistake was that the government had failed to reprint the entire second page of the November 1966 revision of NAVEXOS P-1005-089 in its Exhibit F to the Motion for Summary judgment (see R. 54). Petitioners inadvertently compounded the error by relying on the government's partial text and by reprinting it *in haec verba* in Appendix III to their brief below.

[21]NAVEXOS P-1005-089 (App. D, at 6a-9a).

[22]*See* NCPI 531 (App. D, at 10a-16a); NCPI 610 (App. D, at 16a-18a).

ples enunciated by the Court of Claims in *Piccone v. United States*, 407 F.2d 866 (1969), must be interpreted as providing for mandatory—not discretionary—compliance.

In *Piccone*, the Navy regulation involved was NCPI 352, a regulation related to the regulations—NCPI 531 and NCPI 610—involved here.[23] Specifically at issue was NCPI 352.4-7c(2) relating to the procedures for disability separation of a civilian employee from his job. The regulation provided (407 F.2d at 871):

> "Separation-Disability actions are governed, in general, by the requirements of NCPI 352.5. The following considerations are also for application:
>
> "(2) Where an employee * * * has applied for disability retirement, Separation-Disability action will not be initiated until a determination on his application has been made by the Civil Service Commission."

The government argued in *Piccone*, as it argues here, that NCPI 352.4-7c(2) was discretionary, rather than mandatory. The Court of Claims disagreed (407 F.2d at 872):

> "[T]he Navy regulation . . . is phrased in mandatory terms. It says that 'Separation-Disability *will not* be initiated' where a disability-retirement application has been filed (emphasis added). The introductory command—'The following considerations are also for application'—while somewhat ambiguous, appears more as a command 'for application', than a suggestion 'for consideration'; and the surrounding provisions all contain obligatory directions and standards for the agency. For these reasons we read the regulation as mandatory."

The court then added that "[a]s a general rule we should read a remedial regulation—meant for the benefit of the employee—liberally in his favor, to give him the full measure of protection which the regulation was apparently meant to confer" (*id.* at 872-73).

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[23] *See* note 16, *supra*; NCPI 531.5-7d (App. D, at 15a).

The court found that the regulation was violated since the separation-for-disability action had been commenced while the disability-retirement appeal was still pending. Citing *Service v. Dulles*, 354 U.S. 363 (1957), the court held that the employee's separation was invalid since it "was accomplished through the violation of a controlling regulation" and that therefore the employee was "entitled to back pay" (407 F.2d at 871).

If the Court of Claims in *Piccone* properly found that the Navy regulation there involved was mandatory in scope, here the Ninth Circuit should have found that the Stevedore Rating Definition was also mandatory in scope, especially in light of the Navy civilian employment regulations—NCPI 531 and 610 (App. D, at 10a-18a). For example, NCPI 531.3-2b (App. D, at 11a) speaks in mandatory language: "Rating definitions *become controlling* immediately upon receipt," and "P-1005s *should be applied* immediately to day-to-day actions to which they pertain" (emphasis added). Similarly, NCPI 531-Encl. 2, Part 3.2 (App. D, at 16a) states that, if any ungraded employee does the "kind of work" of stevedoring "as defined in NAVEXOS P-1005-089," he "*/s/hall receive* this additional pay differential" as measured by the "Stevedore" rating definition (emphasis added).[24]

Moreover, while NCPI 531.5-7 (App. D, at 14a-15a) states that "the specified additional pay shall, *in the absence of specific instructions to the contrary*, apply only for the time actually involved in performance of the specified work" (emphasis added), the "full time basis" provision of the Stevedore Rating Definition[25] constitutes a "specific instruction . . . to the contrary." Consequently, petitioners were entitled to additional pay on a "full time basis" as measured by the Stevedore Rating. As stated in

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[24] *Accord*, NCPI 531.5-6b (App. D, at 14a).

[25] NAVEXOS P-1005-089 (App. D, at 7a, 9a).

NCPI 610.5-2a(2) (App. D, at 18a): "As long as the assignment is by competent authority and the employee performs the work assigned, *he is entitled* to the additional pay for the work performed" (emphasis added). In this regard, the additional pay at a "full time basis" for performing stevedoring work for over 50 percent of the time is very little different from the mandatory provisions of the regulations on "Regular additional pay assignment for ungraded employees" set forth in NCPI 610.1-4h(1) (App. D, at 17a): "A regular additional pay assignment also exists for any basic workweek which has been preceded by three consecutive workweeks during which the employee has been required, as the need arose, to perform a given type of *additional pay work for more than 60 hours*" (emphasis added). "[M]ore than 60 hours" in a three-week period, of course, is equivalent to "more than fifty percent" of an employee's time on a 40-hour per week basis.

Thus, the government's position asserted in the courts below, and accepted by the district court,[26] conflicts with the provisions of the Navy civilian employment regulations, which, in accordance with the principles enunciated by the Court of Claims in the *Piccone* case, must be interpreted to have mandatory application. This conflict also requires resolution because of the widespread economic impact the Navy's administrative interpretation must be having on its many ungraded civilian employees.

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[26] The Ninth Circuit did not reach this second issue because it limited its consideration to petitioners' supposed failure to resort to the administrative appeal remedy (see App. A, at 2a). Were this Court to grant certiorari it would be presented not only with the Tucker Act jurisdiction issue but also with the issue whether the provisions of the Navy regulations are mandatory or discretionary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to resolve important questions relating to the administration of the regulations on work conditions and pay for ungraded government civilian employees. *Cf. United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 400 (1966).

Respectfully submitted,

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Dated: August 6, 1971

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE T. ACFALLE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 23,977

[February 18, 1971]

Appeal from the United States District Court of Guam

Before: HAMLEY and BROWNING, Circuit Judges, and SCHNACKE, District Judge*

PER CURIAM:

Appellants' action under the Tucker Act is for wages allegedly due them as civilian employees of the United States Navy at Guam. The court below granted the motion of the United States for summary judgment. We affirm.

Appellants were rated under applicable Navy Regulations as laborers, but allegedly worked more than 50% of their time as stevedores. They were paid stevedores' wages for the time they so worked, and laborers' wages for the balance of the time. By this action they seek stevedores' wages for all time worked. They base their claim on the Navy's General Wage Service "Definitions of Civilian Ungraded Ratings – Stevedore", NAVEXOS P-1005-089

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*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

(Revised 6/62) which states in part under *"Explanatory Notes"*:

> "This rating is commonly used on a when-actually-engaged basis for employees regularly rated as Laborer . . ., during the time that they are employed in loading or unloading ships, barges, and lighters, as described above. *To be used on a full time basis the employee must be performing the work described for more than fifty percent of his time.*" (Emphasis supplied.)[1]

It is the plaintiffs' contention that they are not contesting an improper rating, but rather are seeking the proper pay for the "laborer" rating to which they do not object. The difficulty with this is that they claim increased pay only because, they contend, NAVEXOS P-1005-089 requires that they be rated as stevedores if they perform that work more than 50% of the time. So the increased pay depends upon a change of rating.

An administrative appeal to the Chief of Industrial Relations is available when there is a dispute either as to the rating of a position or the pay level of a rating. Navy Civilian Personnel Instructions 531.3-8. Plaintiffs have neither sought nor exhausted their administrative appeal. Such failure is a bar to this action. *Krennrich v. United States,* 340 F.2d 653 (Ct. Cl.), certiorari denied, 382 U.S. 870; *Johnson v. Nelson,* 180 F.2d 386 (App. D.C.), certiorari denied, 339 U.S. 957, rehearing denied, 339 U.S. 991.

AFFIRMED.

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[1]The emphasized sentence was deleted in a revision of November, 1966. The complaint covers employment over periods ranging from 1959 to 1968.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE T. ACFALLE, et al.,
Plaintiffs-Appellants,

v.

No. 23,977

UNITED STATES OF AMERICA,
Respondent-Appellee.

APPEAL from the United States District Court for the District of Guam.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Guam and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellee and against the appellant.

Costs: Brief of the appellee $20.80

Filed and entered Feb. 18, 1971

APPENDIX C

ORDER DENYING REHEARING BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE T. ACFALLE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 23,977

Appeal from the United States District Court of Guam

Before: HAMLEY and BROWNING, Circuit Judges, and SCHNACKE, District Judge*

PER CURIAM:

The petition for rehearing is denied.

Dated: March [25], 1971

/s/ Frederick G. Hamley,
Circuit Judge

/s/ James R. Browning,
Circuit Judge

/s/ Robert H. Schnacke,
District Judge

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*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

APPENDIX D

ADMINISTRATIVE REGULATIONS INVOLVED

1. The Definition of Civilian Ungraded Rating of Laborer, NAVEXOS P-1005-233, as revised, December 1961, provides as follows:

LABORER

Rating Summary

Performs any one or a combination of a large variety of unskilled or low-skilled tasks, requiring predominantly physical exertion, though not exertion of especially heavy or arduous type. Usually works under close supervision or follows specific directions.

Typical Work Performed

The work assigned to this rating is of too large a variety to permit specific reference to all types. The following duties should be regarded merely as examples to illustrate the appropriate levels of skill and physical demands.

Shovels snow from streets and sidewalks. Operates hand or powered lawnmowers. Loads and unloads trucks and railroad cars. Washes trucks and other vehicles. Shovels coal and ashes. Collects and burns garbage and trash. Cleans up ship, pier, drydock, and other working areas. Opens up or closes crates of material in warehouses and moves material by hand, hand truck, or dollies. Carries material for other workmen. Lifts or pushes material, hauls on lines, and supplies other physical assistance to various operations as directed. Sorts and stacks lumber. Sorts and stacks scrap material as directed or where knowledge of different kinds of material is not required. Loads material in baling presses. Performs duties as temporary deck hand during docking and drydocking of vessels.

Stands as guard and fire watch, as directed, around areas where such operations as cutting and burning, welding, or refueling are going on.

Assists other ratings where rating assisted is of such level as not to warrant a trade-type helper, or where assistance duties require no familiarity with journeyman trade.

Frequently works as a member of a gang.

Explanatory Notes

See also definitions for Laborer (Cleaner), Laborer (Heavy), Helper (General), Helper (Designate by Trade), and Warehouseman.

D.O.T. Code: 9-99.99

2. The Definition of Civilian Ungraded Rating of Stevedore, NAVEXOS P-1005-089, as revised, June 1962, provides as follows:

STEVEDORE

Rating Summary

Working under ship's tackle or dockside or floating cranes, loads and unloads ships, barges, and other vessels. Transports materials between dockside or lighter and ship's deck or hold. Performs necessary rigging, lashing, and stowing; or, when unusually heavy or complex equipment is being loaded, assists Rigger in these functions.

Typical Work Performed

Stacks and piles articles on wharf in such manner as to prevent damage and to provide for efficient loading in proper sequence. Palletizes and lashes material as required. Packs items in carrying or stowing cases as necessary. Loads cargo nets.

Operates conveyors, hand trucks, and high lift trucks to move cargo from dockside to ships. Hitches up material for lifting by crane, hoist, and ship's tackle,

using rope, wire, or chain slings, spreaders, and hooks. Guides load to prevent it from swinging and striking other objects.

Stows cargo in ship's hold. Assists in bracing, blocking and shoring of cargo, as required, and in taking other precautions to prevent shifting of, or damage to, cargo during voyage. Similarly stows cargo on barges and lighters.

Usually works as a member of a large stevedoring crew and works at high pace during closely scheduled loading operations.

May check and tally cargo.

Explanatory Notes

This rating is commonly used on a when-actually-engaged basis for employees regularly rated as Laborer, Laborer (Heavy), High Lift Truck Operator, Warehouseman, or other rating, during the time that they are employed in loading or unloading ships, barges, and lighters, as described above. To be used on a full time basis the employee must be performing the work described for more than fifty percent of his time.

This rating is not applicable to loading and unloading operations which are not performed under ship's tackle or dockside or floating cranes. It is not applicable, for example, to loading or unloading of barges and lighters when no cranes are used. It is not applicable to the loading and unloading of freight cars and trucks outside of the immediate area of ship loading or unloading operations.

When stevedoring work as described above is concerned with loading and unloading of ammunition and explosives, employees are rated as Stevedore (Ammunition and Explosives) on a when-actually-engaged basis. See rating definition for Stevedore (Ammunition and Explosives).

This rating applies to Warehousemen or Stockmen who work as checkers of cargo aboard ship or in the immediate dockside area during stevedoring operations as described above.

For employees who operate ship's hoisting equipment, see definition for Winchman. Dockside cranes and floating cranes are normally operated by Engineman (Hoisting and Portable), directed by Rigger as necessary.

D.O.T. Code: 9-47.10

3. The Definition of Civilian Ungraded Rating of Stevedore, NAVEXOS P-1005-089, as revised, November 1966, provides as follows:

STEVEDORE

Rating Summary

Working under ship's tackle or dockside or floating cranes, loads and unloads ships, barges, and other vessels. Transports materials between dockside or lighter and ship's deck or hold. Performs necessary rigging, lashing, and stowing; or, when unusually heavy or complex equipment is being loaded, assists Rigger in these functions.

Typical Work Performed

Stacks and piles articles on wharf in such manner as to prevent damage and to provide for efficient loading in proper sequence. Palletizes and lashes material as required. Packs items in carrying or stowing cases as necessary. Loads cargo nets.

Operates conveyors, hand trucks, and high lift trucks to move cargo from dockside to ships. Hitches up material for lifting by crane, hoist, and ship's tackle, using rope, wire, or chain slings, spreaders, and hooks. Guides load to prevent it from swinging and striking other objects.

Stows cargo in ship's holds. Assists in bracing, blocking, and shoring of cargo, as required, and in taking other precautions to prevent shifting of, or damage to, cargo during voyage. Similarly stows cargo on barges and lighters.

Usually works as a member of a large stevedoring crew and works at high pace during closely scheduled loading operations.

May check and tally cargo.

Explanatory Notes

This rating is commonly used on a when-actually-engaged basis for employees regularly rated as Laborer, Laborer (Heavy), High Lift Truck Operator, Warehouseman, or other rating, during the time that they are employed in loading or unloading ships, barges, and lighters, as described above.

To be used on a full time basis the employee must be performing the work described for more than fifty percent of his time.

This rating is not applicable to loading and unloading operations which are not performed under ship's tackle or dockside or floating cranes. It is not applicable, for example, to loading or unloading of barges and lighters when no cranes are used. It is not applicable to the loading and unloading of freight cars and trucks outside of the immediate area of ship loading or unloading operations.

This rating applies to Warehousemen or Stockmen who work as checkers of cargo aboard ship or in the immediate dockside area during stevedoring operations as described above.

For employees who operate ship's hoisting equipment, see definition for Winchman. Dockside cranes and floating cranes are normally operated by Engineman (Hoisting and Portable), directed by Rigger as necessary.

STEVEDORE (AMMUNITION AND EXPLOSIVES)

When stevedoring work as defined above is concerned with loading and unloading ammunition, ammunition components, or other explosives or explosive-filled items, employees so engaged will be rated as Stevedore (Ammunition and Explosives), either on a full-time or a when-actually-engaged basis, as appropriate. The hazard compensation is incorporated in the pay level for Stevedore (Ammunition and Explosives) and is not added again separately. Therefore, the additional pay provided in NCPI 531 for Ordnance Hazard is not applicable to either Stevedore or Stevedore (Ammunition and Explosives).

Explanatory Notes

Employees who perform duties of "pusher", "safety officer", "car coordinator", "advisor", or "materials coordinator" for a crew composed of employees rated as Stevedore (Ammunition and Explosives) or Ordnanceman (Ammunition and Explosives-Miscellaneous) are rated as Ordnanceman (Shiploading) on a when-actually-engaged basis. For employees so engaged see definition for Ordnanceman (Shiploading).

This rating applies to Ordnance Workers working as checkers of explosive cargo aboard ship or in the immediate dockside area during stevedoring operations as described above.

The term "ammunition" includes missiles and motors except for Fleet Ballistic Missiles.

4. NCPI (Navy Civilian Personnel Instructions) 531, Wage Fixing and Ungraded Rating Determination, NAVEXOS P-122-531-290, as revised, April 22, 1966, provides in pertinent part as follows:

SECTION 1, GENERAL PROVISIONS

* * * * *

1-2. DEFINITIONS.

* * * * *

f. Rate.

(1) Rate (as a noun).

A specific unit of pay, usually expressed in dollars per hour or year. ("Rate" is sometimes used to mean the same as "rating" but this usage is not encouraged.)

* * * * *

g. Rating.

A category or group of ungraded positions which are sufficiently alike in nature of and qualifications required by their work. . . .

* * * * *

SECTION 3, RATING DETERMINATION

* * * * *

3-2. RATING PLAN.

* * * * *

b. NAVEXOS P-1005, "Definitions of Civilian Ungraded Ratings."

This publication contains the basic guides by which the ratings of positions covered by this NCPI are determined. Rating definitions become controlling immediately upon receipt, and every effort should be made to review affected positions within 90 days thereafter. P-1005s should be applied immediately to day-to-day actions to which they pertain.

* * * * *

3-8. HOW THE RATING OF A POSITION MAY BE APPEALED WITHIN THE DEPARTMENT OF THE NAVY.

a. Coverage.

The appeal procedure set forth here applies to any ungraded position where the sole issue is what the rating of a position should be. An appeal under the procedure can be properly made on only one basis: a belief that the rating of a position is incorrect. . . .

* * * * *

b. Who may appeal?

(1) The employee concerned may appeal the rating of his position, or two or more employees in the same job may make a joint appeal of the rating of their job. . . .

* * * * *

c. When may an appeal be made?

(1) An appeal under this procedure may be made at any time.

(2) If a change to lower grade is involved and retroactive restoration of rank or compensation is sought, the appeal must be timely. To be considered timely, the appeal must be filed within the following time limits:

(a) An employee-initiated appeal must be filed with the commanding officer not later than 10 calendar days after the effective date of the action taken as a result of the rating decision.

* * * * *

(3) A rating determination which has been adjudicated by appeal may not be appealed again, unless a significant change in applicable definitions has intervened.

* * * * *

SECTION 5, ADDITIONAL PAY

5-1. GENERAL.

a. Additional pay is pay added to or in lieu of scheduled pay to compensate for working conditions or assignments not fully compensated by the scheduled pay.

b. Additional pay shall be paid in the circumstances specified by and according to the instructions in this section and the schedules in NCPI 531–Encl. 2.

5-2. COVERAGE.

a. The additional pay schedules and instructions in this section apply to U.S. citizen ungraded employees,

both within the continental United States and in overseas areas.

* * * * *

5-3. HOW ADDITIONAL PAY SCHEDULES ARE ESTABLISHED.

a. General.

Additional pay schedules are established only by OIR [Office of Industrial Relations]. The following points are pertinent to the establishment and administration of additional pay schedules:

(1) The scheduled rate of pay for any ungraded rating normally provides compensation for a wide range of personal hazards, physical demands, and working conditions, as well as for assignments of an employee to duties within the scope of his rating which involve varying levels of skill, knowledge, and responsibility.

(2) Occasional assignment of an employee to duties of a more skilled, responsible, or difficult rating than his normal rating, for training or try-out purposes, is a normal aspect of employee development.

* * * * *

b. Policy.

In view of the considerations above, it will not often be necessary to establish new additional pay schedules. Hence, new additional pay schedules will not be established unless they can be clearly proved necessary for sound personnel management in keeping with the following:

* * * * *

(2) An additional pay schedule to provide that an ungraded employee assigned to perform duties of a specified higher-paid rating will be paid at the rate of pay for the higher-paid rating during the time assigned will not be established unless the following conditions are met:

(a) The "additional pay" duties must be beyond the scope of the employee's regular rating and clearly within the scope, and representative of the full skill level, of the specified higher rating (such that, if these duties were to be performed on a continuing basis, a conversion of the employees concerned to the higher-paid rating would normally be required), and

(b) The additional pay schedule must be needed not for continuing assignments but for relief of short-term (normally not more than 30 days) workload difficulties, or for immediate assignments of very limited duration, or for recurring intermittent short assignments, where in these cases it is not practicable to follow normal recruitment or temporary promotion procedures to obtain qualified employees.

* * * * *

5-6. DERIVING TOTAL PAY.

To derive total pay of an employee entitled to additional pay, observe the following rules:

* * * * *

b. Pay of another rating.

Where the additional pay assignment is to work characteristic of an established rating (see Part 3.2 of the table in NCPI 531-Encl. 2), the employee shall be paid at that step rate of the higher rating which corresponds to his step rate in his regular rating. For example, a Laborer (1st step) given an additional pay assignment to stevedoring work would be paid the scheduled rate for Stevedore (1st step); while, a Laborer (3rd step) given the same assignment, would be paid the scheduled rate for Stevedore (3rd step).

* * * * *

5-7. LENGTH-OF-TIME CONSIDERATIONS.

The table in NCPI 531-Encl. 2 is divided into three parts: 1—Hazardous Work, 2—Difficult Working Conditions and Unusual Working Hours, and 3—Extra Skill Work. In Part 1, disposition of length-of-time con-

siderations is indicated in each entry appearing in column 3. For assignments covered by Parts 2 and 3, the specified additional pay shall, in the absence of specific instructions to the contrary, apply only for the time actually involved in performance of the specified work, or in working under the specified conditions.

* * * * *

c. See NCPI 610 for instructions regarding minimum time credits, and for circumstances under which "regular" additional pay assignments incur additional pay on a full-time basis.

d. See NCPI 352 for instructions regarding termination of "regular" additional pay assignments.

5-8. ADDITIONAL PAY ASSIGNMENTS WITHIN THE SCOPE OF ESTABLISHED RATINGS.

Use of the additional pay schedules in Part 3.2 of the table in NCPI 531-Encl. 2 is subject to the following:

* * * * *

b. Use of the additional pay rating must be in conformance with applicable rating guides; the work must be such that, if it were performed on a continuing basis, a regular assignment and employment of an employee in the rating on which the additional pay schedule is based would be appropriate.

* * * * *

Encl. 2

ADDITIONAL PAY SCHEDULES

Part 1—Hazardous Work

* * * * *

Part 2—Difficult Working Conditions and Unusual Working Hours.

* * * * *

Part 3.1—Extra Skill Work Involving Duties Not Within the Scope of an Established Rating

* * * * *

Part 3.2—Extra Skill Work Involving Duties *Within* the Scope of Certain Established Ratings

* * * * *

1.	2.	3.
These kinds of employees unless restricted by P-1005 rating definition (See NCPI 531.5-2 and 9.)	Doing this kind of work	Shall receive this additional pay differential (See NCPI 531.5-6b and 5-8.)
Any	*3.208 Stevedoring.* Duty as Stevedore, as defined in NAVEXOS P-1005-089 (6/62), or supervising stevedoring work.	Stevedore (or appropriate supervisory rating derived therefrom).

* * * * *

5. NCPI (Navy Civilian Personnel Instructions) 610, Hours of Work, NAVEXOS P-122-610-270, as revised, July 22, 1965, provides in pertinent part as follows:

SECTION 1, GENERAL PROVISIONS

* * * * *

1-4. DEFINITIONS.

* * * * *

e. Compensation.

"Compensation" means pay or some other form of reward for services rendered. All forms of compensation are based on law. No employee of the Government may be compensated except as authorized by law.

(1) Additional pay.

This is compensation in the form of pay given mostly to ungraded employees because of skill or environmental factors. See NCPI 352, NCPI 531.5 and NCPI 610.5.

* * * * *

h. Regular.

"Regular" generally means "according to the rule" and "recurring." The word has been used with slightly different meaning in different laws. For this Instruction the following meanings apply:

(1) Regular additional pay assignment for ungraded employees.

A regular additional pay assignment exists when an ungraded employee is scheduled for three consecutive workweeks or more to perform a given type of additional pay work during specified hours. A regular additional pay assignment also exists for any basic workweek which has been preceded by three consecutive workweeks during which the employee has been required, as the need arose, to perform a given type of additional pay work for more than 60 hours. . . .

* * * * *

SECTION 5, ADDITIONAL PAY

5-1. EXPLANATION.

Additional pay means extra compensation over and above that authorized by statute or administratively established for the employee's classification or rating. It is a means of compensating the employee for environmental conditions not encountered by all employees in his classification or rating, or for the performance of work of a skill level not required of all employees in his rating. . . . Ungraded employees receive additional pay for night work and also for a number of types of work specified in NCPI 531. . . .

5-2. UNGRADED EMPLOYEES.

a. The work situation.

* * * * *

(2) Other additional pay work.

As in the case of night work, the nature of the employee's assignment to other additional pay work does not affect entitlement to additional pay. He may be formally or informally assigned, or assigned for a single occasion or for a prolonged period. As long as the assignment is by competent authority and the employee performs the work assigned, he is entitled to the additional pay for the work performed.

* * * * *

APPENDIX E

LIST OF PLAINTIFFS WITH DATES OF APPOINTMENT AND TERMINATION AS LABORERS/STEVEDORES*

NAME	DATE APPOINTED	DATE TERMINATED
Jose T. Acfalle	6/18/59	
Ramon R. Acfalle	3/23/59	
Edward Q. Aguigui	8/11/65	
Charlie G. Aguon	6/20/66	
Eddy A. Aguon	8/12/65	
Jose A. Aguon	NO RECORD	
Luis W. Agustin	12/12/66	7/8/68
Jose Q. Aquiningoc	5/29/59	
Jose R. Aquiningoc	8/12/65	
Juan Q. Aquiningoc	5/29/59	
David P. Atoigue	6/27/66	2/10/68
Franklin R. Babauta	7/6/66	
Ignacio E. Babauta	3/23/59	
Jesus C. Babauta	7/5/66	8/29/67
Juan T. Babauta	6/15/60	
Enrique B. Benavente	6/5/67	
Albert F. Borja	7/3/66	
Joaquin F. I. Calip	6/15/67	
Benny R. Campos	5/11/59	
Joseph G. Candaso	8/16/65	
Jesus B. Castro	4/27/59	
Jose G. Castro	8/11/65	
Ramon G. Castro	10/4/66	
Ramon P. Castro	3/20/59	7/11/66
Tomas N. Castro	12/18/66	7/27/68
Vicente S. Castro	6/13/66	
Ponciano C. Champaco	6/13/66	
Francisco S. Chiguina	3/16/59	
Jesus P. Concepcion	11/1/66	

*As set forth in the government's Exhibit A(1) (R. 42-44).

NAME	DATE APPOINTED	DATE TERMINATED
Jose B. Concepcion	3/23/59	
Jose M. Crisostomo	12/6/66	
Manuel P. Crisostomo	12/18/66	
Antonio C. Cruz	10/11/54	9/26/67
Francisco M. Cruz	3/12/66	
Frankie K. Cruz	5/21/67	
Jesus D. Cruz	8/17/65	
Jose S. Cruz	8/11/65	
Joseph R. Cruz	7/5/66	
Juan Q. Cruz	6/27/66	
Juan S. Cruz	5/4/59	
Vicente C. Cruz	11/28/66	
Vicente C. Cruz	7/27/59	
Juan L. Diaz	3/16/59	
Joseph C. Diego	9/12/66	
Joaquin F. Duenas	5/9/63	
Jose C. Duenas	7/9/62	
Anthony J. Espinosa	7/7/66	
Ignacio T. Espinosa	7/6/66	
Jesus J. Fegurgur	11/7/60	
Felix L. G. Flores	7/10/62	8/28/68
Francisco C. Flores	7/3/66	
Antonio S. N. Fujikawa	6/22/59	
Francisco J. Garrido	11/3/66	
Juan Q. Gofican	9/5/65	
Juan K. Gogue	12/20/65	
Vicente C. Gomez	4/20/59	9/8/66
Domingo C. Guerrero	12/20/65	
Francisco L. Guerrero	NO RECORD	
Jesus Q. Guerrero	11/16/59	
Manuel S. Guerrero	3/30/59	
Crescenciano Hoomana	1/31/66	
William L. G. Ignacio	8/11/65	1/15/68
Francisco D. Iriarte	4/27/59	2/10/67
Alfred W. Jackson	7/6/66	
Jesus T. Lujan	4/27/59	
Jose S. Mafnas	6/20/66	6/16/68
Jesus T. Meno	6/26/66	

NAME	DATE APPOINTED	DATE TERMINATED
Pedro T. Meno	12/20/65	
Jesus P. Mesa	11/9/59	
Pedro C. Mesa	11/3/66	5/17/68
Vicente Q. Nangauta	7/6/66	
Francisco F. Naputi	12/20/65	
Jesus N. Naputi	3/23/59	
Jose C. Naputi	3/26/67	
Pedro S. Nauta	11/23/59	
Jose T. Nededog	4/19/67	8/27/68
Gregorio B. Pablo	3/30/59	10/6/67
Jesus P. Pinaula	3/16/59	
Jose N. Quichocho	7/6/66	
Francisco M. Quidachay	7/25/66	6/30/68
Benny A. Quinata	6/27/66	
Ignacio A. Quinata	5/25/59	
Johnny D. Quinata	8/17/65	
Juan A. Quinata	6/27/66	3/8/68
Francisco C. Quintanilla	10/4/66	9/1/67
Jesus C. Quintanilla	6/13/66	6/4/68
Jesus T. Quintanilla	7/2/67	
Manuel C. Quintanilla	12/6/64	
Vicente P. Quintanilla	3/30/59	
Vicente T. Quintanilla	6/27/66	
Vicente C. Reyes	7/3/66	
Jesus L. G. Rivera	8/18/63	
Ignacio T. Sahagon	5/11/59	
Jesus M. Salas	3/16/59	6/14/68
Joaquin A. Salas	6/13/66	
Jose A. Salas	4/27/59	
Jose T. Salas	8/6/62	2/9/66
Vicente T. Salas	8/5/65	
Albert S. San Nicolas	3/23/59	
Jose Santiago	6/6/60	
Enrique B. Santos	2/25/68	
Phillip D. Santos	10/17/66	
Roque Santos	3/30/59	7/19/67
Walter R. Santos	11/14/66	
Johnny W. Taijeron	1/25/68	6/16/68

NAME	DATE APPOINTED	DATE TERMINATED
Jose B. Concepcion	3/23/59	
Jose M. Crisostomo	12/6/66	
Manuel P. Crisostomo	12/18/66	
Antonio C. Cruz	10/11/54	9/26/67
Francisco M. Cruz	3/12/66	
Frankie K. Cruz	5/21/67	
Jesus D. Cruz	8/17/65	
Jose S. Cruz	8/11/65	
Joseph R. Cruz	7/5/66	
Juan Q. Cruz	6/27/66	
Juan S. Cruz	5/4/59	
Vicente C. Cruz	11/28/66	
Vicente C. Cruz	7/27/59	
Juan L. Diaz	3/16/59	
Joseph C. Diego	9/12/66	
Joaquin F. Duenas	5/9/63	
Jose C. Duenas	7/9/62	
Anthony J. Espinosa	7/7/66	
Ignacio T. Espinosa	7/6/66	
Jesus J. Fegurgur	11/7/60	
Felix L. G. Flores	7/10/62	8/28/68
Francisco C. Flores	7/3/66	
Antonio S. N. Fujikawa	6/22/59	
Francisco J. Garrido	11/3/66	
Juan Q. Gofican	9/5/65	
Juan K. Gogue	12/20/65	
Vicente C. Gomez	4/20/59	9/8/66
Domingo C. Guerrero	12/20/65	
Francisco L. Guerrero	NO RECORD	
Jesus Q. Guerrero	11/16/59	
Manuel S. Guerrero	3/30/59	
Crescenciano Hoomana	1/31/66	
William L. G. Ignacio	8/11/65	1/15/68
Francisco D. Iriarte	4/27/59	2/10/67
Alfred W. Jackson	7/6/66	
Jesus T. Lujan	4/27/59	
Jose S. Mafnas	6/20/66	6/16/68
Jesus T. Meno	6/26/66	

NAME	DATE APPOINTED	DATE TERMINATED
Pedro T. Meno	12/20/65	
Jesus P. Mesa	11/9/59	
Pedro C. Mesa	11/3/66	5/17/68
Vicente Q. Nangauta	7/6/66	
Francisco F. Naputi	12/20/65	
Jesus N. Naputi	3/23/59	
Jose C. Naputi	3/26/67	
Pedro S. Nauta	11/23/59	
Jose T. Nededog	4/19/67	8/27/68
Gregorio B. Pablo	3/30/59	10/6/67
Jesus P. Pinaula	3/16/59	
Jose N. Quichocho	7/6/66	
Francisco M. Quidachay	7/25/66	6/30/68
Benny A. Quinata	6/27/66	
Ignacio A. Quinata	5/25/59	
Johnny D. Quinata	8/17/65	
Juan A. Quinata	6/27/66	3/8/68
Francisco C. Quintanilla	10/4/66	9/1/67
Jesus C. Quintanilla	6/13/66	6/4/68
Jesus T. Quintanilla	7/2/67	
Manuel C. Quintanilla	12/6/64	
Vicente P. Quintanilla	3/30/59	
Vicente T. Quintanilla	6/27/66	
Vicente C. Reyes	7/3/66	
Jesus L. G. Rivera	8/18/63	
Ignacio T. Sahagon	5/11/59	
Jesus M. Salas	3/16/59	6/14/68
Joaquin A. Salas	6/13/66	—
Jose A. Salas	4/27/59	
Jose T. Salas	8/6/62	2/9/66
Vicente T. Salas	8/5/65	
Albert S. San Nicolas	3/23/59	
Jose Santiago	6/6/60	
Enrique B. Santos	2/25/68	
Phillip D. Santos	10/17/66	
Roque Santos	3/30/59	7/19/67
Walter R. Santos	11/14/66	
Johnny W. Taijeron	1/25/68	6/16/68

NAME	DATE APPOINTED	DATE TERMINATED
Juan T. Taijeron	3/30/59	
Alfred S. Taitague	10/4/66	
Juan L. G. Taitague	8/21/65	
Prudencio Q. Taitague	8/20/65	
Rodney C. Taitague	5/10/66	
Ignacio C. Tedpahago	4/27/59	
Jose M. Tedpahago	11/15/65	
Jesus F. Tedtaotao	5/28/67	
Angel B. Tenorio	7/3/66	
Manuel L. Tenorio	4/19/67	6/16/68
Margarite S. N. Tenorio	5/9/66	
Pedro M. Tenorio	4/1/59	
Baldovino A. Terlaje	11/6/66	6/19/68
Jesus D. Toves	6/13/67	
Juan T. Toves	7/5/66	
Robert M. Zahnen	8/4/67	

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No. 71-185

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSE T. ACFALLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-185

JOSE T. ACFALLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action for additional pay allegedly due a number of present and former civilian employees employed between 1962 and 1968 at the United States Naval Supply Depot, Guam.

In June 1962, employees at the Naval Supply Depot then holding the rating of stevedore were demoted to the grade of laborer through a reduction in force. Petitioners alleged that during their subsequent employment, they spent more than 50 percent of their time doing stevedoring work. Petitioners received stevedore pay when actually performing this stevedoring work and laborer pay while performing laborer

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work, but claim that they should have been paid full time at the rating of stevedore. Their claim is based on a Navy regulation set forth in the opinion below (Pet. App. 2a). There is no record that any of petitioners ever filed an appeal of the 1962 reduction in force either to the Civil Service Commission or to the Department of the Navy, or that any of petitioners subsequently filed a grievance with the Department of the Navy under Navy Civilian Personnel Instruction procedures.

The district court granted the government's motion for summary judgment, and the court of appeals affirmed, holding in a *per curiam* opinion that petitioners' failure to seek an administrative appeal before the Chief of Industrial Relations under Navy Civilian Personnel Instructions 531.3–8 barred the present action (Pet. App. 1a–2a).

The decision of the court below is correct and conflicts with no other reported decision. Since petitioners concede that they were paid at stevedore rates when actually performing stevedore work (Pet. 4), their claim for full-time stevedore pay based on their performance of more than 50 percent of their work at stevedore duties necessarily—as the court of appeals expressly found—"depends upon a change of rating" (Pet. App. 2a). Accordingly, petitioners' failure to exhaust administrative remedies available to contest changes in rating bars the present action. *Krennrich* v. *United States*, 340 F.2d 653 (Ct. Cl.), certiorari

denied, 382 U.S. 870; *Johnson* v. *Nelson*, 180 F. 2d 386 (C.A.D.C.), certiorari denied, 339 U.S. 957.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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[1] The decisions claimed by petitioners to be in conflict with the decision below are inapposite. In *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, this Court dealt with issues concerning the coverage of the standard government contract "disputes" clause. No such issues are involved in the present case. Similarly, the Court of Claims decision in *Piccone* v. *United States*, 407 F. 2d 866, involved a Navy regulation relating to the procedures for disability separation or retirement.

CERTIORARI DENIED N.C.R.

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